Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1350

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

v.

CITY OF BOULDER, COLORADO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the respondent, City of Boulder. The City has consented to the filing of the brief, but the petitioner has withheld consent. The letters granting and withholding consent, respectively, have been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in evaluating the suitability of home rule (as granted to local governments by the people of a state in the case of a constitutional amendment, or by the state legislature in the case of statutory home rule) as the state authorization for municipal

activity which satisfies the test established by this Court's decisions for municipal antitrust immunity. NIMLO's interest in the issue is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the nature and purpose of grants of home rule during the last hundred years and considers whether local government regulation, through the franchise power, of cable television is an area which the states generally, through home rule, have ceded to local governments without either the expectation or the possibility of continuing, detailed, and technical state-level supervision.

Because of the emerging popularity of cable television, and the flux in both its regulatory environment and its technology, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide importance of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) is a national organization of cities operated by their attorneys. NIMLO, founded in 1935 and organized as a nonprofit association, consists of 1600 local governments, which participate in NIMLO's work through their chief legal officers, variously called city or county attorney, corporation counsel, city solicitor or law director, and the chief legal officer's assistants. The City of Boulder, Colorado, is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization which provides information and research to its member governments on current legal problems of local concern, including regulation of cable television, and on home rule.

The local government attorneys who participate in the work of NIMLO are responsible for drafting cable television franchise ordinances and agreements. These attorneys advise their governments on the antitrust implications of municipal action in all areas, and defend the actions of their governments when challenged in court. These attorneys have lived under the uncertainty following this Court's decision in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). These attorneys recognize that a test for governmental antitrust immunity which can be satisfied only by express words on immunity addressed to antitrust from a state administrative agency or the state legislature itself is both unworkable and in conflict with the letter and spirit of the widespread grant of home rule to local governments. The application of the test to cable television franchising illustrates the unworkability of the test quite clearly.

NIMLO, therefore, urges this Court to avoid both a frustration of the goals of local government home rule and the vitiation of the *Parker v. Brown*[1] test of antitrust immunity, just as the Court of Appeals below did. Because that Court properly analyzed both the nature of home rule and the practical impossibility of requiring express state action, other than through the grant of home rule, in a case such as this, NIMLO urges affirmance of the judgment of the Court of Appeals.

---

[1]317 U.S. 341 (1943).

STATEMENT OF THE CASE

Boulder, Colorado's cable television franchise regulations have much in common with those recommended to cities nationally. Boulder's franchise to the petitioner was non-exclusive, revocable,[2] and lasted for twenty years, Pet. 2, A-1, A-50–51. The Federal Communications Commission has proposed that franchises be for 15-year periods, 66 F.C.C.2d 380 (1977), proposing amendment to 31 C.F.R. §76.31(a)(2). The Urban Institute's Cable Television Information Center prefers non-exclusive, revocable franchises, CTIC, How to Plan an Ordinance: An Outline and Some Examples, 6, 47 (1977).

The impetus for the petitioner's antitrust challenge was Boulder's application of its franchise regulations in order to compare competitive proposals from the petitioner Community Communications Co., and Boulder Communications Co., Pet. 3; Brief for Petitioners, 6; Pet. A-40, A-43 (opinion of the District Court); Pet. A-2 (opinion of the Court of Appeals) or any other interested cable proprietor.[3]

Differing with the contrary view of the District Court, the Court of Appeals held that Boulder's enactment and enforcement of its franchise regulations were immune from antitrust challenge. The Court of Appeals reasoned that Boulder was not competing with the petitioner, but was enforcing an affirmative governmental policy, Pet. A 8–A-9. In that regard, Boulder was exercising its home rule

[2]As Boulder has pointed out, Brief in Opposition, at 2, this feature was required by the Colorado Constitution.

[3]Boulder was motivated by the perception that competition would be impossible as a practical matter if the petitioner were allowed to wire the entire city before the City Council could review the petitioner's and competing proposals. See Brief in Opposition, at 3 (citing trial exhibits).

power to act in matters of local concern, Pet. A-6, and the home rule grant of power was sufficient state action under the precedents of this Court. Therefore, the Court of Appeals concluded, Boulder's cable television ordinances were not subject to injunction on the assertion the ordinances violated the antitrust laws.

SUMMARY OF ARGUMENT

It is our submission that, whenever a state has ceded its power to a local government through a grant of home rule, that cession constitutes sufficient state action to satisfy the first requirement for local government immunity from the antitrust laws set out in the precedents of this Court. Here, the City considered the competitive impact of its regulatory action; and this satisfied the second requirement. So, if its action was "state action", the City is within the perimeter of the immunity.

1. The nature and history of local government home rule show that through it a state provides a cession of power, without the possibility or desire of retaining supervisory jurisdiction in any state agency. After the grant of home rule power, its exercise is entirely by the city.

2. Moreover, the current trend in the governance of the states, under home rule and otherwise, is to provide that the regulation of cable television is a matter for local government without state interference or supervision.

Therefore, the silence of the State of Colorado on Boulder's longstanding regulation of the cable television activities of the petitioner is perfectly congruent with the

longstanding total cession of state power to Boulder under the Colorado Constitution, and, in light of the nature of cable television and the experience in other states with regulation of it, was the only practical state action. Having the benefit of this state action, Boulder's knowing and reasonable exercise of its regulatory power is immune from antitrust attack.

ARGUMENT

The decision of the Court of Appeals below rests on two grounds: (1) that Boulder was acting within the grant of home rule power of Article XX of the Colorado Constitution when it regulated the cable television activities of the petitioner through the two ordinances challenged here; and (2) that this grant and exercise of the home rule power constituted sufficient state action and authorization of the City's regulation to make the City's action immune from antitrust challenge.

The first ground of decision is a question of state law, which cannot properly be before this Court. The second ground of decision is congruent with the actions of the states, both in creating and maintaining municipal home rule, and in apportioning between themselves and their municipalities regulatory power over cable television.

I

THE ESSENTIAL FEATURE OF HOME RULE, AN *A PRIORI* CESSION OF STATE POWER TO A MUNICIPALITY WITHOUT EITHER THE POSSIBILITY OR EXPECTATION OF FURTHER STATE SUPERVISION, CONSTITUTES STATE ACTION

The Court of Appeals correctly synthesized the test of *Parker v. Brown*, 317 U.S. 341 (1943), *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), and *California Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), to constitute as a requirement for government antitrust immunity that an expression of state policy clearly comprehend the challenged government action, and that the policy be supervised by the state.

Although the Court of Appeals thought the *Lafayette* case distinguishable, Pet. A-8, it held also that Colorado's grant of home rule satisfied the first requirement of the test, and that the City Council's actions pursuant to the home rule grant clearly satisfied the second part of the test. *Ibid.*

The petitioners essentially concede that, if the City's action is state action within the meaning of *Parker-Lafayette-Midcal*, then the elements of a knowingly articulated and actively supervised government policy were satisfied. Pet. 8. Otherwise stated, the petitioners would not challenge the actions of the City Council if they had been done by a state agency. The petitioner's sole ground for reversal here is that the rule applicable to a state government is not applicable to a home rule local government.

Therefore, the only issue in this case is whether home rule transmutes Boulder's action into state action.

A. State Silence is an Expected Feature of Home Rule, and the Silence is Construed as Authorization of Municipal Action

Home rule, first authorized in 1875 in Missouri, developed as a means to adapt to local needs the fast-

increasing activities of government.[4] The method of home rule was to substitute local government legislation, regulation and activity for state legislation, regulation and activity, within the proper sphere of local concerns. Home rule was granted either by constitution or by statute; the essence of either form was the selection by the local voters of a form of government and the apportionment of powers within the government.

Home rule is designed to free the state legislature from numerous local requests for special legislation, and, correspondingly, to permit municipal action "without waiting for state legislative authorization." Vanlandingham, Municipal Home Rule in the United States, 10 William and Mary L.Rev. 269, 270 (1968). While, after home rule has been established for a particular municipality, state supervision is sharply reduced, the initial adoption of home rule by the municipality is attended by complex state law requirements, both substantive (limited local taxing authority, e.g.) and procedural (charter advisory committees, e.g.). Home rule is far from an expression of lack of state interest. Rather, it is an *a priori* delegation of state power, with the understanding that, however the municipal officials handle their delegated power, they will be held accountable by the local voters.

Controversy soon arose over the rules to resolve a conflict between a home rule ordinance and a state statute. A continuing source of controversy has been the delineation of the border between matters of local and of statewide concern, even in the absence of state legislation. None of these issues is involved in this case.

[4]The general legal theory of home rule is described in 2 E. McQuillin, Municipal Corporations §4.28 (3d ed. rev. 1979), and in Thomas, *City of Lafayette*'s State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities, 1980 Ariz. St. L.J. 345, 371-72.

This case involves the application of home rule to a local matter in the face of the state's silence after the initial grant of home rule power. The nature and purpose of home rule show that such silence was expected to occur often, and that the silence was to be taken as an affirmative state authorization of local government action. Dean Fordham[5] has summarized the affirmative nature of home rule:

> "The objective reaches beyond protection from particular legislative intervention; it goes toward assuring large cities and other units freedom of action in confronting a myriad of problems in contemporary life, as contrasted with traditional dependence upon the legislature for enabling legislation as to authority, structure and procedure."

J. Fordham, Local Government Law 70-71 (rev. ed. 1975).[6]

So, by the 1950's, legislative silence was seen as state acquiesence in the actions of home rule municipalities. The National League of Cities' (then, the American Municipal Association) Model Constitutional Provisions for Municipal Home Rule, §6 (1953), provided:

> "HOME RULE CHARTER POWERS
> "A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute."[7]

---

[5]Jefferson Fordham is the prime mover of the modification, embodied in the National League of Cities' provision, discussed *infra*, of home rule to give maximum authority to state legislatures in home rule states. See Vanlandingham, *supra*, 10 William and Mary L. Rev., at 299.

[6]See also *id.*, at 73 (collecting statutes of the several states).

[7]See also, National Municipal League, Model State Constitutions, §8.02 (1963); Advisory Commission on Intergovernmental Relations, State Legislative Program, 185-86 (1963).

The Comment to this section of the League's model provisions makes clear that in some cases the state is expected to legislate to limit the exercise of municipal powers, but that, where the legislature is silent, the silence is to be taken as state authorization for local government action:

> "2. There is no question but that the draft does not go so far in its grant of home rule power as many advocates of home rule would like. It does not place any substantive powers and functions beyond legislative control by general law. The theory of the draft is not to create an imperium in imperio with municipal freedom from legislative control, but to leave a charter municipality free to exercise any appropriate power or function except as expressly limited by charter or general statute. This emphatically reverses the old strict-constructionist presumption against the existence of municipal power and, so long as the legislature does not expressly deny a particular power, renders unnecessary petitioning the legislature for enabling legislation."[8]

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[8]The "imperium in imperio," rejected by the Comment, is associated with Colorado's form of home rule, among others. Vanlandingham, *supra*, 10 William and Mary L. Rev., at 286-87, 291.

Therefore, the view that legislative silence constitutes state action is applicable in states with more restrictive home rule grants than that of Colorado involved in this case.

So, the nationwide view of home rule counsels affirmance of the judgment of the Court of Appeals. That this case arose in Colorado merely makes it an *a fortiori* case.

Finally, it should be noted that legislative silence has been proposed as a workable method of resolving the preeminent and perennial problem of home rule administration—which is not involved in this case—namely, the resolution of conflict between state and local law. Vanlandingham, *supra*, 10 William and Mary L. Rev., at 305, proposes that "municipalities could be empowered to act in areas or on subjects where the state legislature has acted, subject to a legislative veto . . . of the next legislative session."

In sum, legislative silence after the grant of home rule power to a particular municipality is essential to the theoretical and practical nature of home rule. But, home rule is not an irresponsible abandonment of state power; it has not been an early state-level form of deregulation. Rather, and especially under the Fordham-National League of Cities model in vogue now, home rule represents, at the granting stage, a detailed balance between state and municipal action. Within the sphere of local concerns, however, the state legislature then intends to be silent; and it intends the silence to authorize municipal action.

That, of course, does not end the inquiry. Home rule status does not insulate every municipal act from antitrust review. It merely equates city action with "state action." More remains:

> "The municipal action, as state action, would be analyzed to determine if it reflected a legitimate regulatory interest. A city, like the state, would not be immune from liability for anticompetitive conduct designed to protect its own commercial interests. A city could not establish "state policy" by ordinance to immunize its own commercial activities from antitrust liability. Thus, commercial/entrepreneurial activities of a city would be protected by the state action exemption only when those activities were "compelled," "commanded," "directed," or "authorized" by state legislation. Nor could a city ordinance "immunize" private persons from the federal antitrust laws. Municipal acts would be exempt from antitrust liability only where the city had a legitimate regulatory interest and had made an affirmative determination pursuant to delegated state authority that that interest was of sufficient magnitude to displace the federal interest in preserving competition."

Thomas, *City of Lafayette*'s State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities, 1980 Ariz. St. L.J. 345, 379-80.[9]

In this case, however, the petitioner cable company essentially concedes the correctness of the conclusion of the Court of Appeals that Boulder's activity was regulatory, not commercial, and that Boulder appreciated fully the competitive impact of its actions. Petitioner's whole case[10] is that Boulder's action, however reasonable, was not "state action." And that case must fail.

So here, Colorado granted Boulder home rule within a detailed constitutional scheme. From that point, Colorado's silence in matters of local Boulder concern was expected, and that silence has been realized. That state silence in the face of Boulder's active regulation of cable television constitutes the state's policy within the meaning of this Court's antitrust immunity precedents.

B. In Other Areas of Federal Law as Well, State Silence After a Cession of Power is Consistent with State Action

The holding that an *a priori* cession of state power constitutes state action is a common one in the other major area of federal law in which the existence of "state action" is a requirement for some liability or immunity. That area is civil rights.

[9]At the same time, home rule, an apportionment of regulatory power, is perfectly consistent with a vigorous policy of enforcing the antitrust laws against private anticompetitive transactions. That is the traditional role of state governments, and the *amici* states are to be congratulated on their interest in private-sector enforcement. Amici Curiae Brief for the States of Alaska, et al., at 1. That role, and that interest, however, has nothing to do with this case.

[10]This choice of threshold ground is hardly surprising in a case arising out of a preliminary injunction.

State action is required for liability to accrue under the Fourteenth Amendment. Since *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 289 (1913), this Court has employed a functional test: whether "the act be one which there would not be opportunity to perform but for the possession of some state authority." In that case, a city's designation of telephone rates was challenged as confiscatory, and the issue was whether the city's was "state action," 227 U.S., at 282-83. It was sufficient to the Court in holding that passage of a city rate ordinance was state action to point to "the authority of a municipal ordinance passed in virtue of power conferred by a state. . . ." 227 U.S., at 294.[11]

The California grant to Los Angeles in *Home Telephone* of the power to regulate telephone rates was as general, *a priori*, and unsupervised[12] as Colorado's power to Boulder to regulate cable television rates and operations.[13]

Home Telephone is instructive in another regard as well. There, telephone rate regulation was an area of traditional state involvement. Yet, state supervision of, or consent to, Los Angeles' ratemaking was not necessary to the finding of "state action" in the City's action.

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[11]The Court in *Home Telephone* found cases imputing to a city the state action required under the Contracts Clause, Art. I, § 10, of the Constitution, to be persuasive. 227 U.S., at 295-96.

See also *Screws v. United States*, 325 U.S. 91, 116 (1945) (Rutledge, J., concurring).

[12]See also *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (city leaflet ordinance); *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (city airport lease to restaurant); *Hunter v. Erickson*, 393 U.S. 385, 389 (1969) (city charter amendment requiring referendum approval of fair housing ordinance); *Edelman v. Jordan*, 415 U.S. 651, 667, n.12 (1974).

[13]The cases in this area concern only city action as "state action." The question whether individual action is "state action" is not involved. (cf., Brief for Petitioner, at 19, n.9.)

Cable television regulation presents the *a fortiori* case: here, there is no tradition of state involvement,[14] and the current wisdom counsels against state interference in municipal cable television regulation.

II

EVEN APART FROM HOME RULE, STATES RECOGNIZE MUNICIPAL REGULATION OF CABLE TELEVISION AS AN AREA IN WHICH DETAILED STATE SUPERVISION IS INAPPROPRIATE

The particular exercise of the general home rule power at issue in this case, regulation of cable television, is parallelled by a general local government power to regulate the use of its streets through the franchise.[15] Even in cities without home rule powers, control of the streets is one of the areas in which express and particularized state grants of municipal power are most common.[16]

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[14]See section II of this Brief, *infra.*

[15]The State of Colorado has reprinted Boulder's ordinances relying on this power. See, Amicus Curiae Brief for the State of Colorado in Support of the Petitioner (on certiorari), at 17, & App. G, H, I, J.

[16]12 E. McQuillin, Municipal Corporations §34.01 (3d ed. rev. 1970). That text continues:

> "Formerly, the right to grant franchises to use the streets was to a large extent withheld from municipalities and vested in the legislature which could grant the use of streets without the consent of the municipality or its citizens and inhabitants, and even without compensation; but the tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets of the respective municipalities, and the value of local self-government in this respect is self-evident."

Id., §34.01, at 7 (citing cases).

Moreover, regulation through the franchise power is now seen as regulation for the public welfare rather than a privilege or a contractual relationship solely between a municipality and a cable television operator:

> "Franchises have been regarded as special privileges granted by the government to particular individuals or companies to be exploited for private profits. They are coming to be regarded, however, not so much as privileges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control."[17]

Therefore, it can hardly be doubted "from the [home rule] authority given a governmental entity to operate in a particular area [in light of the long history of local autonomy in exclusive and nonexclusive revocable street franchises in the public interest] that the [Colorado] legislature contemplated the kind of action [by Boulder] complained of." *Lafayette, supra,* 435 U.S., at 394 (mutatis mutandis).

Even apart from considerations of home rule, the states which have reviewed the role of state government in the use of the municipal franchise power to regulate cable television have concluded that active state supervision of municipal regulation is inappropriate.

In 1979, Pennsylvania[18] studied the desirability of state agency regulation of local cable television franchising and concluded:

> "we would recommend that neither an independent state regulatory agency nor the PUC assert jurisdiction over cable television. . . . . the major impact point

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[17] *Ibid.* (citing cases).

[18] Precursors in other states from the previous decade are collected in Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Lawyer 685, 756 (1972).

of cable operations is on the municipal level. Local governments can best determine, through negotiation with cable companies, the local public interest of CATV within their communities."[19]

The result of Pennsylvania's study is hardly surprising. The constant change in the technical features of a franchised cable television system which will best serve a city's residents is well known to local government officials.[20] The practical power of a particular local government to insist on a high degree of technical sophistication in cable television service depends on the attractiveness of the area as a cable market (including the availability of the entire city as a market), and on competition for the franchise.

The general attitude of the state cable television studies to preserve local flexibility and progress by preserving local autonomy, in recognition of the revocability of franchises, is precisely the kind of general grant of state authority which suffices as state authorization under *Lafayette.* E.g., *Cedar-Riverside Associates, Inc. v. United States,* 459 F.Supp. 1290, 1298 (D. Minn. 1978).

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[19]Pennsylvania Local Government Commission, Cable Television in the Commonwealth of Pennsylvania: Analysis and Recommendations, at 104-105 (November 1979). Rather, the Commission recommended legislation expanding local government authority, *id.*, at 102, and creating a state Bureau of Cable Communications to provide technical assistance, make studies and mediate disputes, *id.*, at 104.

[20]Rice, Cable: the Possibilities, Colorado Municipalities, November-December 1980, 15, lists: cablecasting public hearings and bus schedules (often broadcast to only the affected part of a wired community), community organization access requirements, joint franchising by several cities, the capacity of several community systems to share programming, and two-way features to allow polling subscribers.

In this case, Boulder tried to use the competition which its ordinances contemplated to the best advantage of its citizens' localized needs. That is precisely what the states expect their local governments to do.[21]

[21]Judge Markey in dissent, Pet. A-27, pointed out that Colorado's Public Utilities Commission had seen itself without jurisdiction over cable television. Judge Markey, like the District Court, was prompted by "wider concerns" than the application of this Court's antitrust immunity precedents. Pet. A-29.

CONCLUSION

Even apart from home rule, state supervision of municipal cable television regulation is considered unwise. There is no practical possibility of express state supervision of municipal action in this area.

That is precisely the void home rule was designed to fill. By articulating the rules of its noninterference in local concerns in advance, a state granting home rule initially has taken state action.

The state's subsequent silence in municipal affairs is the expected and preferred result under home rule. It is up to the home rule municipality to take all further governmental action.

Boulder did so here, assessing the anticompetitive potential of its regulation, as the Court of Appeals held, Pet. A-8, and as the petitioner concedes.

Therefore, the home rule grant to Boulder and Boulder's active regulation of cable television under that grant satisfy the requirements of state action.

Boulder's actions, therefore, were immune from antitrust attack, as the Court of Appeals correctly held under the precedents of this Court. The judgment should be affirmed.

Respectfully submitted,

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June 1981